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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

WILLIE BRAY, LORENE DAVIS, RANDOLPH WIGGINS, JOAN COLBURN, MARY ROE, JOHN DOE, and all other members of the Class,
Petitioners,

vs.

STATE OF MICHIGAN: Governor of the State of Michigan; MICHIGAN DEPARTMENT OF STATE: Secretary of State; MOTOR VEHICLE ACCIDENT CLAIMS FUNDS DIVISION: Director of the Motor Vehicle Accident Claims Fund; State Treasurer; DEPARTMENT OF COMMERCE — INSURANCE BUREAU: Commissioner of Insurance,
Respondents.

PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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INTRODUCTION

Respondents' brief contains virtually no case law and establishes that the decision below is totally indefensible. Rather than address the issues, Respondents assert that under the Eleventh Amendment, this Court cannot *review* a state court case in which the state was a party. *This argument was considered, rejected and laid to rest by this Court in 1821.*

Not only are Respondents' arguments without merit or support, they are based upon misstatements of fact.

REASONS FOR GRANTING THE PETITION

1. THE ELEVENTH AMENDMENT IS NOT A BAR

Under the Eleventh Amendment, "an unconsenting state is immune from suits brought in federal courts by her own citizens. . . . *Pennhurst State School & Hospital* v. *Halderman*, ____ U.S. ____, 104 S.Ct. 900, 79 L.Ed.2d 67, 78 (1984), quoting *Employees* v. *Missouri Public Health & Welfare Dep't.*, 411 U.S. 279, 280, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973). The Amendment thus applies only to suit *commenced* in the federal courts, and not to cases instituted in state courts which are reviewed by this Court. Indeed, in *Cohens* v. *Virginia*, 19 U.S. 264, 5 L.Ed. 257 (1821), this Court held that the Eleventh Amendment does not bar this Court's review of state court decisions, regardless of the identity of the parties:

> "It is, then, the opinion of the court, that the defendant who removes a judgment rendered against him by a state court into this court for the purpose of re-examining the question whether that judgment be in violation of the constitution or laws of the United States, does not commence or prosecute a suit against the state whatever may be its opinion where the effect of the writ may be to restore the party to the possession of a thing which he demands.
>
> * * *

> *It [the request for review by this Court] is not then, within the amendment, but is governed entirely by the constitution as originally framed, and we have already seen, that in its origin, the judicial power was extended to all cases arising under the constitution or laws of the United States, without respect to parties.*" 19 U.S. at 412 (emphasis added).[1]

Even assuming the Eleventh Amendment was somehow applicable to a review of this case, it would not be a bar. Respondents' position is premised on two erroneous statements — 1) that Plaintiffs seek retroactive money damages and 2) that a refund would come from the State Treasury. Both statements are totally false.

In this case, Plaintiffs filed suit before the effective date of the No-Fault Act, that is, before Plaintiffs' privilege to drive as uninsured motorists was terminated, without a refund of any portion of the fee Plaintiffs had paid for that privilege. Plaintiffs sought a judicial declaration that the *anticipated* actions by the state, its agencies, and individual officers would be unconstitutional. In other words, Plaintiffs sought to compel a return of the *pro rata* share of the $45 fee if a portion of the privilege were terminated.[2]

Edelman v. *Jordan*, 415 U.S. 651, 94 S.Ct. 1437, 39 L.Ed.2d 662, *reh. denied*, 416 U.S. 100 (1954), specifically

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[1] *Accord: Smith* v. *Reeves*, 178 U.S. 436, 445, 20 S.Ct. 919, 44 L.Ed. 1140 (1900). *See generally*, Tribe, *American Constitutional Law* (1978), p. 131 ("And neither sovereign immunity nor the eleventh amendment bars Supreme Court review of state court judgments in suits in which the state is a party since supremecy of federal law requires review of the federal questions presented by such judgments.").

[2] The No Fault Act became effective on October 1, 1973. The date the Act was passed is not relevant. Under Michigan law, until a statute becomes effective (i.e. on the stated date of effectiveness), it is not notice and is not binding. *See, Price* v *Hopkins*, 13 Mich. 318 (1865); *Weaver* v. *Harvey*, 32 Mich. App. 424, 188 N.W.2d 905 (1971).

held that this sort of prospective relief against state officers does not offend the Eleventh Amendment:

> "As in most areas of the law, the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night. The injunction issued in *Ex Parte Young* was not totally without effect on the State's revenues, since the state law which the Attorney General was enjoined from enforcing provided substantial monetary penalties against railroads which did not conform to its provisions. Later cases from this Court have authorized equitable relief which has probably had greater impact on state treasuries than did that awarded in *Ex parte Young*. In *Graham* v. *Richardson*, 403 US 365, 29 L Ed 2d 435, 91 S Ct 1848 (1971), Arizona and Pennsylvania welfare officials were prohibited from denying welfare benefits to otherwise qualified recipients who were aliens. In *Goldberg* v. *Kelly*, 397 US 254, 25 L Ed 2d 287, 90 S Ct 1011 (1970), New York City welfare officials were enjoined from following New York State procedures which authorized the termination of benefits paid to welfare recipients without prior hearing. *But the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature.* State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young, supra.*

But that portion of the District Court's decree which petitioner challenges on Eleventh Amendment grounds goes much further than any of the cases cited. It requires payment of state funds, not as a necessary con-

sequence of compliance in the future with a substantive federal-question determination, but as a form of compensation to those whose applications were processed on the slower time schedule at a time when petitioner was under no court-imposed obligation to conform to a different standard . . . It is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials." 415 U.S. at 667-668 (emphasis added).

In addition, even where a plaintiff seeks relief for a state defendant's past unconstitutional actions, *Edelman* only proscribes compensatory damages "*which must be paid from public funds in the state treasury*" or "which must be met from the general revenues of a state." *Id.* at 663, 664 (emphasis added). In this case, Plaintiffs have only asked for the return of a portion of their *own money* which was held in trust by the State in a separate fund, distinct from the general revenues the State collected from the public at large. Because Plaintiffs only sued for the return of their own funds about to be wrongfully withheld and converted by the defendant-trustees, the Eleventh Amendment would not have barred relief, even retroactively (after the conversion occurred).[3]

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[3] Respondent asserts that the Fund is "currently actuarily insolvent." Respondent's brief, p. 7. The so-called insolvency was created by a transfer of trust fund moneys to the General Fund. This was accomplished by a failure to pay interest on loans from the trust fund to the General Fund (*see*, Petition, pp. 29-32) and subsequently, by a complete transfer of the corpus of trust fund to the General Fund. For example in the years 1976-1983, the following moneys were transferred from the Fund:

1976 Mich. Pub. Acts, No. 241 §1	$ 7,309,974
1977 Mich. Pub. Acts, No. 98, §1	$ 793,955
1978 Mich. Pub. Acts, No. 402, §1	$ 3,171,700
1979 Mich. Pub. Acts, No. 111, §1	$10,350,900
1980 Mich. Pub. Acts, No. 376, §1	$ 3,691,000
1981 Mich. Pub. Acts, No. 30, §1	$ 1,923,800
1982 Mich. Pub. Acts, No. 281, §1	$ 1,415,800
1983 Mich. Pub. Acts, No. 170, §1	$ 1,446,800

Hence, the General Fund is holding trust fund moneys, which are not public funds or general revenues of the State.

Finally, plaintiffs would be entitled to both prospective and retroactive relief, whether from general public funds or from the trust fund of Plaintiffs' uninsured motorist fees, because the State waived its Eleventh Amendment sovereign immunity and consented to be sued on Plaintiffs' claims. It is axiomatic that the Eleventh Amendment is inapplicable if a state waives its sovereign immunity or consents to suit. *Eg. Edelman* v. *Jordan, supra; Clark* v. *Barnard*, 108 U.S. 436, 447, 2 S.Ct. 878, 27 L.Ed. 780 (1883) ("The immunity from suit belonging to a state . . . is a personal privilege which it may waive at pleasure."). Moreover, a state may so waive its immunity by its actions in voluntarily participating in proceedings against it, by actively defending on the merits rather than appearing only to protest the court's exercise of jurisdiction. *Clark*, 108 U.S. at 447-448; *Ford Motor Co.* v. *Treasury Dep't. of Indiana*, 323 U.S. 459, 65 S. Ct. 347, 89 L.Ed.2d 389 (1945). When a state affirmatively participates in the litigation and defends on the merits, without raising a claim of immunity until the final appeal, the state is deemed to have consented to suit and waived its Eleventh Amendment Immunity — as long as the officer who represented the state in the proceedings was authorized to consent to suit and waive the immunity. *Ford*, 323 U.S. at 467.

The State of Michigan has authorized the Attorney General to waive sovereign immunity and consent to suit in specific cases, even in the absence of a legislative enactment waiving immunity. In *Hunt* v. *State Highway Comm'n.*, 350 Mich. 309, 86 N.W.2d 345 (1957), the Michigan Supreme Court rejected the state's claim of sovereign immunity, even though no statute waiving the immunity was applicable in the case and declared:

> "From these postulates we turn initially to the fact that defendant unequivocally submitted himself to the jurisdiction and thereby cast aside the vestments of immunity, if such ever were worn by him. There was no thought or suggestion of immunity when the suit was

> instituted or thereafter during trial thereof . . . . It was not until the chancellor ruled by formal opinion that plaintiffs were entitled to relief, and that the cross bill should be dismissed, that this 'I cannot be sued' defense was brought forth.
>
> Equity is impatient with games of such nature — the essence of which is affirmation of jurisdiction should the chancellor rule favorably and a denial of jurisdiction otherwise — and regards entry upon suit by a State officer, through bill or cross bill authorized by him, as carrying with it the acceptance of whatever liability the chancellor may decide is reasonably incident to such pleading and appeal for relief." 350 Mich. at 320.

Similarly, in *People, ex rel. Attorney General* v. *Detroit, G.H. & M.R. Co.*, 157 Mich. 144, 158, 121 N.W. 814 (1909), the Michigan Supreme Court held that the statutes authorizing the Attorney General to represent the state in lawsuits "constitute a waiver of the rights of the state not to be sued without its consent." The Court found that where the state, through its authorized agent, the Attorney General, contested a suit on the merits, and the state actively appealed, and so became the moving party, taking the plaintiff to a higher court and protracting the litigation, then "the acts and conduct of the state after suit was brought, as above stated, constitute a waiver of its immunity." *Id.*

It is abundantly clear that under Michigan law the state may waive its sovereign immunity through the actions of the Attorney General in actively contesting the suit on the merits, appealing an adverse decision and only asserting immunity at the eleventh hour when the case has reached the court of last resort. Here it is beyond dispute that the state, by participating, defending, and appealing to the State Supreme Court without so much as a mention of immunity, has waived whatever claim of sovereign immunity it might have had and has consented to be sued on Plaintiff's claims. Thus the Eleventh Amendment posed no obstacle to relief.

2. RESPONDENTS' ARGUMENT THAT PLAINTIFFS DID NOT HAVE A PROPERTY INTEREST OR CONTRACT IS BASED ON MISSTATEMENTS OF FACT

In their petition, Plaintiffs established the property rights which they had acquired upon payment of the $45 fee. *See*, Petition, pp. 16-29. There is no question that without payment, Plaintiffs could not legally operate their uninsured vehicles.

Respondents assert that Plaintiffs acquired no property interest because insured motorists contributed $1 and were required to carry mandatory uninsured motorist coverage. Both claims are completely untrue. *Insured motorists* did not contribute 1¢ to the Fund after the 1971 registration year (4a, n. 1). And, insured motorists were not required to purchase uninsured motorist coverage — insurance companies were required to offer it. Mich. Comp. Laws §550.3010.

The plain fact is that Plaintiffs paid $45 in return for the right to operate their uninsured vehicles and their moneys were unlawfully converted and their entitlements terminated in violation of the constitution of the United States.

CONCLUSION

For the reasons expressed in the Petition and this Reply this Court should grant certiorari.

Respectfully submitted,
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